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Constitution of the United States:

Fifth Amendment

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 886

SALVATORE FRASCONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 110-120 and amendment R. 136-137) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1962 (R. 121). A petition for rehearing was denied on March 19, 1962 (R. 138). The

petition for a writ of certiorari was filed on April 18, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a government informer called by the defense may claim the protection of the Fifth Amendment.

STATEMENT

The petitioner, charged with narcotics violations, was convicted on four counts involving two transactions in heroin. He was sentenced to seven years' imprisonment on each count to run concurrently, and fined $1,000 on each count (R. 1-3). The court of appeals unanimously affirmed the judgment of conviction.

The pertinent facts supporting the conviction are not in dispute and may be briefly summarized as follows: On October 6, 1958, a federal narcotic agent was introduced to the petitioner by an informer (R. 21-22, 30, 36, 42). Thereafter, on October 7, 1958, the government agent purchased pure heroin from petitioner for $400, and on November 21, 1958, purchased over two ounces of heroin (R. 20-30). Another federal narcotic agent participated in the second purchase (R. 48-55). During the testimony of the agent who primarily dealt with petitioner, the defense counsel asked for the name of the government informer who had introduced the agent to the petitioner. He was told it was Joseph Bove, who at the

time of trial was in prison in Danbury, Connecticut (R. 30). At the request of the defense, the federal agent checked the records and determined that the informant received no payment in connection with this case (R. 32, 39).

The petitioner, as part of his case, called the government informer, Joseph Bove (R. 55). The trial judge advised Bove, "you may refuse to answer any questions that might be asked if you feel that they might tend to degrade or incriminate you" (R. 55). Thereafter, Bove declined to answer most questions by claiming "I take the Fifth Amendment and I refuse to answer on the ground that it may tend to incriminate me or degrade me" (R. 56, 67). Typical questions included, "Do you know this man?"—referring to a federal narcotic agent (R. 56-58). Other questions referred to his knowledge of petitioner, the location of the first sale, the introduction of the agent, and whether he had given information to the Bureau of Narcotics (R. 62-65). To these questions, Bove stated, "I refuse to answer. I take the Fifth for the same reason" (R. 62-65).

ARGUMENT

Petitioner argues that because the government testimony showed that Bove, acting as an unpaid government "special employee", had introduced the government agent to petitioner, the informer, when called by the defense, should not have been allowed to claim the privilege against self-incrimination. Since the fact that a person participated in crime does not mean that he loses his privilege against self-

incrimination, the implicit assumption in petitioner's argument seems to be that the mere fact that Bove acted as a special employee means that his claim of possible self-incrimination must be false.

There is no basis for this contention. The fact that Bove may have aided the government in making the introduction to petitioner did not give Bove immunity from prosecution. The three questions petitioner most strenuously contests (Pet. 4) were susceptible on their face to a reasonable claim of the privilege. In each instance the answer could have tied the informant to the first sale of narcotics for which petitioner was on trial and could conceivably have implicated Bove in a narcotics ring. In this setting even an explanation of the assertion of the privilege could be dangerous. Thus the claim was properly sustained. See *Hoffman* v. *United States*, 341 U.S. 479, 486-487.[1]

Moreover, petitioner never made any offer of proof as to what he hoped to establish by Bove's testimony, and the record does not indicate what significance Bove's testimony could have had for the defense. The government's testimony was merely that Bove had introduced one agent to petitioner. There is no indi-

[1] The petitioner notes (Pet. 3) but does not present as a question that the court of appeals found no reversible error when the trial judge advised the witness that he need not answer if he felt the answer might "degrade or incriminate" him. This ruling was correct in view of both the failure of trial counsel to object to this wording at a time when it could be corrected, and the obvious sufficiency of the claim by the witness. See *Emspak* v. *United States*, 349 U.S. 190, 194.

cation in the record that Bove participated further in the sale of heroin, and the record does not disclose his presence at the subsequent sales in October or November. In these circumstances, the government had no reason to call Bove to prove its case, and Bove's testimony, even if it had been at variance with that of the agent as to the introduction, would have had no bearing on the evidence as to the sales. Two agents testified to the second sale in November as to which there is no showing of any participation by Bove whatsoever.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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